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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 484

THE UNITED STATES, PETITIONER

v.

R-B FREIGHT LINES, INC., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE MOTOR CARRIER CLAIMS COMMISSION

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the final determination of the Motor Carrier Claims Commission entered in the above-entitled case on April 28, 1951, and modified on July 24, 1951.

OPINION BELOW

The opinion of the Motor Carrier Claims Commission is set out at pp. 13-51 of the record.[1]

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[1] In accordance with a stipulation entered into by the parties, subject to the Court's approval, only the formal record has been printed for the purpose of this petition for a writ of certiorari. However, the entire record before the Motor Carrier Claims Commission has been certified to this Court and, under the stipulation, may be referred to by either party.

JURISDICTION

The Motor Carrier Claims Commission was created by the Act of July 2, 1948, as amended (62 Stat. 1222, as amended, 49 U.S.C., Supp. IV, 305 note), to "hear and determine, according to law, existing claims against the United States arising out of the taking by the United States of possession or control of any of the motor-carrier transportation systems described in" Executive Order No. 9462 (Section 2, *infra*, p. 42). Jurisdiction to determine these claims was vested in the Commission, rather than left with the Court of Claims, where, in the absence of such legislation, it would normally reside (cf. *United States* v. *Wheelock Bros., Inc.*, 341 U.S. 319), because it was thought that such a tribunal would be in a position to dispose of these claims more expeditiously than the Court of Claims. See H. Rep. No. 2182, 80th Cong., 2d Sess., p. 3; 94 Cong. Rec. 8949-8950. The Commission's final determination was to fix the amount of just compensation, if any, due to an owner of a seized motor carrier—a determination long regarded as involving the exercise of the judicial function (cf. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312)—and was to be accorded the same finality as judgments of the Court of Claims (Section 11(a), *infra*, p. 45).[2]

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[2] Section 11(a) provides in pertinent part:

> When the report of the Commission determining any claimant to be entitled to recover has been filed with

Jurisdiction to review these determinations by writ of certiorari is vested in this Court by Section 9 of the Act (*infra*, pp. 44-45), which jurisdiction is supported by *United States* v. *Jones*, 119 U.S. 477; *United States* v. *Coe*, 155 U.S. 76; *Wallace* v. *Adams*, 204 U. S. 415; *Ex parte Bakelite Corp.*, 279 U.S. 438, 449-457.

The final determination of the Commission, here involved, was entered on April 28, 1951. On July 24, 1951, the Commission denied the Government's motion for rehearing, which had been seasonably filed, and entered an order modifying the final determination. On October 20, 1951, the Chief Justice extended the time within which a petition for a writ of certiorari might be filed to and including December 22, 1951, "provided there is statutory authority therefor."

There is statutory authority for this extension, for it is clear from the Motor Carrier Claims Commission Act of July 2, 1948, that the Commission was to be in effect a special Court of Claims to hear and determine the claims of the motor carriers arising out of the seizure, and Section 9 of the Act explicitly provides that the Commission's determinations shall be "subject to review in the same manner as is provided for cases in the Court of Claims upon application to the Supreme Court within three months from the date of the filing of

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Congress, such report shall have the effect of, and be paid in the same manner as is provided for, a final judgment of the Court of Claims.

such determination with the clerk." *Infra*, pp. 44-45. As to the Court of Claims, there is no question that the time for filing petitions for certiorari to review its judgments is governed by the time-extension provisions of 28 U.S.C. 2101(c). Moreover, these broad terms of Section 2101(c), embracing "*Any* other appeal or *any* writ of certiorari intended to bring *any* judgment or decree in a *civil action, suit or proceeding* before the Supreme Court for review," (italics supplied) authorize this Court to extend the time for filing any petition, from whatever court or tribunal, for an additional period not exceeding 60 days (at least in the absence of any clear and specific indication to the contrary). The fact that Section 9 fixes three months rather than 90 days as the time limit for the filing of petitions does not remove final determinations of the Commission from the coverage of 28 U.S.C. 2101(c), for when the Act of July 2 was enacted, 28 U.S.C. 2101(c) (which was approved June 25, 1948) was not yet operative, and Section 9 conformed to the pattern of 2101(c)'s predecessor, 28 U.S.C. (1946 ed.) 350, which prescribed three months as the time limit within which petitions for certiorari were to be filed.[3]

[3] The instant situation is wholly different from that involving the Emergency Court of Appeals. 50 U.S.C. App. 924(d), relating to that court, imposes, first, a time limit of 30 days for the filing of petitions for certiorari and then provides that "*thereupon* the judgment or order shall be subject to review by the Supreme Court in the same manner as a judg-

QUESTIONS PRESENTED

In the summer of 1944, a wage dispute developed between certain midwestern motor carriers of freight, including respondent R-B Freight Lines, Inc., and their over-the-road drivers, which resulted in a strike and the complete cessation of motor transportation over the struck lines. The President by Executive Order authorized assumption of federal control over these carriers, in order to bring about the resumption of operations which was deemed essential for the successful prosecu-

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ment of a circuit court of appeals * * *" (italics supplied). In addition to this extremely short period for filing a petition for certiorari in a civil case, Congress further required this Court to "advance on the docket and expedite the disposition of all causes filed * * * pursuant to this subsection," apparently in light of the fact that the various regulations subject to review by the Emergency Court of Appeals may not be stayed pending judicial review, despite their immediate, and possibly adverse, effect on segments of the civilian economy. Cf. *Yakus* v. *United States*, 321 U.S. 414, 437-438. The entire thrust of the Emergency Price Control Act is toward speedy disposition of disputes. In such a situation, there may be reason for not permitting extensions of time for the filing of petitions for certiorari.

Here, on the other hand, the time for filing a petition for certiorari mentioned in the statute is the normal one, and, moreover, no special stress is placed upon the three months period; on the contrary, it is part of the provision for "review in the same manner as is provided for in cases in the Court of Claims", and the emphasis, if any, appears to be that the time should begin to run "from the date of the filing of such determination with the clerk." Furthermore, there is no reason of policy, as there may be in price control matters, for unusual hastening of the disposition of these cases. The claims filed with the Motor Carriers Claims Commission seek compensation for past acts of the Government, which have no present economic impact and, consequently, there is not present here the urgency which may be thought to require the denial of time extensions in certiorari from the Emergency Court of Appeals.

tion of the war. Until December 31, 1944, R-B continued in operation under private management as before the seizure, with minimal interference by the Government. Effective January 1, 1945, the private management was removed and thereafter until November 1, 1945, when Government control was terminated, R-B was operated as a federal instrumentality. The questions presented are:

1. Whether, assuming there was a taking prior to January 1, 1945, as well as thereafter, the Commission properly measured the just compensation to which R-B is entitled by the aggregate rental value of R-B's motor and office equipment leased as individual units.

2. Whether the Government's intervention during the period prior to January 1, 1945, resulted in a temporary taking of R-B's motor carrier transportation system, so as to entitle it to just compensation under the Fifth Amendment for that period.

STATUTE INVOLVED

The Motor Carriers Claims Commission Act of July 2, 1948, as amended, is set forth in Appendix A, *infra*, pp. 42-46.

STATEMENT

This is the first of the 103 cases pending before the Motor Carrier Claims Commission in which that Commission has made a final award of just compensation. The pertinent facts—as found by

the Commission and as shown by the evidence—are as follows:[4]

A. *The work stoppage and Government intervention:* On and for several years prior to August 11, 1944, when the Federal "take-over" occurred, R-B Freight Lines, Inc.[5] was certified by appropriate federal and state agencies as a common carrier of property by motor vehicle in the States of Minnesota, South Dakota, North Dakota and Montana, with its principal common carrier operations being between Minneapolis-St. Paul, Minnesota and Aberdeen, South Dakota and its vicinity (R. 14).[6] For some years prior to August 11, 1944, the midwest motor carriers, including R-B, had been confronted with rising operating costs induced by

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[4] The Government does not question the Commission's findings of evidentiary facts as far as they go but it believes that these findings do not contain all the facts necessary for this Court to make a proper disposition of the issues raised.

[5] R-B began motor operations as a partnership at Aberdeen, South Dakota, in 1933. The business was incorporated under its present name in 1939. At all material times since 1939, G. W. Rickerd was president and served as superintendent of the mechanical shops and George H. Buergi was its secretary-treasurer and general manager (R. 14).

[6] In addition, R-B (1) operated a passenger bus in daily service between Aberdeen and certain cities in South Dakota and (2) transported by motor vehicle liquid petroleum products under a special contract. R-B also held authority to, and did, transport household goods by motor vehicle throughout a number of midwestern states. In conducting its business, R-B owned and operated motor tractors, trucks, semi-trailers, pick-up and delivery trucks and one bus. R-B also owned certain real estate as well as miscellaneous personal property, such as office machines and equipment, shop and garage machines and equipment, and other items of property necessary and useful in a transportation business (R. 14).

wartime conditions generally, and strongly affected by increasing labor costs (R. 14). Because of these operating difficulties, R-B, for several months prior to August 11, investigated the possibility and desirability of devoting its motor vehicles and equipment to some more desirable use, and late in July 1944, it engaged in negotiations for the leasing of certain of its motor vehicles to Allied Van Lines of Chicago (R. 17).

During the two-year period after November 15, 1939, which was the period of its first contract with the union representing its over-the-road drivers, R-B was able to obtain a so-called "South Dakota Rider," providing for a lower hourly wage scale and working conditions more favorable to the employers than those prevailing in the midwest area east of the Mississippi (R. 15).[7] In the succeeding contract, which was negotiated by the union and the Central States Employers Association of Chicago,[8] R-B was unable to obtain such a rider, although the National Defense Mediation Board,

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[7] Historically, motor carriers in the midwest area, west of the Mississippi River, operated under substantially different conditions from those existing in highly industrialized areas in the central states to the east. This western area was predominantly agricultural; there were fewer industries requiring trucking service; the distances to be covered were greater; the roads were poorer; the winters in the north and west were more severe and more damaging to road transportation, and the population to be served was smaller. (R. 15.)

[8] This Association was composed of motor carriers from 12 states and was dominated by carriers located in the large industrial areas of Detroit, Chicago, and points in Ohio (R. 15).

to which the matter of a differential was referred at one stage, directed that a suitable rider be negotiated (R. 15). Despite the failure to obtain such a rider, R-B and other midwestern carriers signed the contract (R. 15). Thereafter, R-B and certain other carriers withdrew from the Association and formed a smaller group of midwest carriers with common interests and similar operating conditions, called the Midwest Operators Association, for the purpose of conducting labor negotiations for its members (R. 15-16).

In the negotiations with the union in 1943, the Midwest Operators Association sought to obtain a differential similar to the South Dakota rider (R. 16). These negotiations became deadlocked and on October 13, 1943, the matter was certified to the War Labor Board (R. 16). On February 7, 1944, WLB decided the dispute by directing that the existing wage rates be increased by 7 cents per hour and 2.5 mills per mile, retroactive to November 16, 1943, with half a mill to be added to the mileage rates on July 1, 1944 (R. 16). Despite WLB's refusal to reconsider its decision upon their request, the carriers did not put the new contract into effect and, instead, operated under the terms of the old contract (R. 16). On July 12, WLB reported the matter to the President (R. 16).

On August 4, the over-the-road drivers of 103 carriers, including R-B, went on strike (R. 16). Prior to the calling of the strike, the members of

the Association had discussions as to the likelihood of such a strike and voted unanimously by secret ballot that they would "take the strike" if it should come (R. 16). After the strike began, R-B continued transportation of general commodities long enough to deliver the freight in transit on August 4 and to clear up its docks of freight which had accumulated prior to the strike. By August 9, all freight trucks and freight operations had stopped and R-B had ceased to operate as a common carrier (R. 17); all motor vehicles were idle, except for its passenger bus and several pieces of equipment used in the transportation of petroleum products under special contract, *supra*, p. 7, fn. 6 (R. 17). On August 7, 1944, R-B's directors decided to make all necessary plans for the liquidation of the business or for possible Government seizure (R. 17).

On August 11, 1944, the President issued Executive Order No. 9462 (9 Fed. Reg. 10071) authorizing the Director of the Office of Defense Transportation (ODT) (R. 17-19):

> * * * to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of the [103 listed [9]] motor carriers * * * in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to

[9] R-B was one of the motor carriers listed (R. 19).

carry out the provisions and purposes of this order.[10]

On the same day, the Director notified the carriers, including R-B, of the Executive Order and of its purpose "to assure the maintenance of an effective system of transportation for the movement of troops, materials of war, and supplies and food for the armed forces and the civilian population" (R. 19-20). Also on August 11, the Director appointed a Federal Manager who simultaneously issued his Operations Order No. 1, directed to each of the listed motor carriers, including R-B (R. 20-21, 21-25).[11]

On August 12 and 13, a meeting was held in Minneapolis at which the Federal Manager and ODT's General Counsel explained the Executive Order and Operations Order No. 1 to the assembled representatives of the motor carriers, including R-B (R. 26). In addition, they stated that the operation

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[10] The Executive Order continued (R. 18):

> 2. * * * the said transportation systems shall be managed and operated under the terms and conditions of employment in effect between the carriers and the collective bargaining agents at the time possession is taken under this order. During his operation of said transportation systems the Director shall observe the terms and conditions of the directive order of the National War Labor Board, dated February 7, 1944: *provided, however,* that in the case of each said transportation system the Director is authorized to pay the wage increases provided for by the said directive order of the National War Labor Board, which accrued prior to the taking of possession of the said system under this order, only out of the net operating revenue of the said system.

[11] The provisions of Operations Order No. 1 (R. 21-25) are set out in the Appendix B, *infra*, pp. 46-53.

of the carriers was essential; that the primary object was to move traffic; and that ODT desired to utilize the managing and operating personnel who had previously operated the motor carrier transportation systems in so far as possible (R. 26). At the conclusion of the meeting, the Federal Manager arranged with George H. Buergi, R-B's general manager (fn. 5, *supra*, p. 7) that he would serve as operating manager and that, in such capacity, he would operate R-B's transportation system and properties under the Federal Manager's supervision and direction and subject to direction from the office of the Federal Manager.

On August 14, R-B filed with the Federal Manager an "Acceptance and Protest" agreeing to comply with the order to resume operations (as provided in Section 1 of Operations Order No. 1) but specifically protesting the assumption of any responsibility for the continuance of the operation, financially or otherwise (R. 26). On August 18, the Federal Manager, by "Protest Decision No. 1," directed that notwithstanding such protest the requirements of Operations Order No. 1 should be placed or continued in effect until further notice (R. 26). These arrangements remained in effect until January 1, 1945, when, because of R-B's financial difficulties, the Federal Manager replaced Mr. Buergi as operating manager with an employee of the Federal Manager (Ex. P-69 (Report of Federal Manager), pp. 48-50).

B. *The Government's actions during the control period:* 1. *Prior to January 1, 1945:*[12] In addition to maintaining general authority and control over the operation of R-B's transportation system during the period from August 11 to December 31, 1944, the following acts were done by the Federal Manager (R. 26-28):[13]

Within the first week after taking possession, the Federal Manager caused to be posted on R-B's various terminal buildings, a notice which stated:

> At 12:01 A.M. on August 12, 1944, possession of the properties of this transportation system was taken by the United States under authority of the President's Executive Order dated August 11, 1944, and Notice and Order of the Director of the Office of Defense Transportation of the same date.

This notice further advised that any interference with the operation of such property would constitute a criminal offense under the Federal statutes (R. 27). Beginning in August 1944, Government employees, subordinate to the Federal Manager, called at R-B's offices from time to time to observe

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[12] Compare the findings of the Court of Claims in *Wheelock Bros., Inc.* v. *United States*, 115 C. Cls. 733 (reversed, 341 U.S. 319), and the Government's brief in the *Wheelock* case, Nos. 169, 177, Oct. Term, 1950, at pp. 7-17.

[13] The evidence before the Commission showed that in all other respects Mr. Buergi, R-B's general manager, operated the motor carrier system during this period in much the same way as he had done prior to the take-over.

its compliance with the Federal Manager's orders (R. 27).

The Federal Manager determined conditions of employment and fixed the amount of wages to be paid employees, specifically by ordering that over-the-road drivers be paid the wage increase prescribed by WLB on February 7, 1944, (*supra*, p. 9), which order was put into effect (R. 27). On August 16, 1944, the Federal Manager ruled that the WLB directive required the payment of increased wages to pick-up and delivery employees in the "Twin Cities" (R. 27). In addition, the Federal Manager, in October 1944, settled at least two labor disputes involving R-B's employees, upon reference to him by Buergi (R. 28).

On August 16, 1944, the Federal Manager, by "Accounting Circular No. 1," prescribed certain accounting methods and procedures which were put into effect by the Operating Manager (R. 27).[14] In September, 1944, the Federal Manager instructed Buergi to dispense with the services of a freight solicitor previously engaged by R-B; this instruction was complied with (R. 27). Buergi

[14] Among other things, this "Circular" called for certain inventories to be made as of 12:01 A.M., August 12, 1944. It also provided that "Transactions recorded in the books of original entry subsequent to 12:01 A.M. August 12, 1944, shall clearly indicate the portion, if any, applicable to the period prior thereto." Another provision was: "The present ledger accounts shall be maintained solely for the purpose of posting entries applicable to the period prior to 12.01 A.M. August 12, 1944. New ledger accounts shall be opened for the purpose of entering the tranactions applicable to the period subsequent thereto." (R. 27).

also complied with the Federal Manager's instruction to discharge the rate expert previously employed by R-B (R. 27).

During the fall of 1944, the Federal Manager required Buergi to alter the customary method of handling shortages and overages of freight shipments, and the normal method of handling the interchange of freight between R-B's system and other carriers (R. 28). The Federal Manager ordered the discontinuance of one of the routes of R-B, and refused R-B's request to release certain pieces of equipment for lease to Allied Van Lines, Inc. (R. 28).

The Federal Manager, the Commission found, assumed control of rates and the publication thereof, in one instance ordering the publication by the Midwest Motor Freight Tariff Bureau of a new minimum charge rule, such minimum charge rule being subsequently placed into effect. The Federal Manager notified R-B on November 17, 1944, that no independent rate action should be taken without the prior written approval of the Federal Manager's office (R. 28).

2. *After January 1, 1945*: Effective January 1, 1945, Buergi was replaced as operating manager by a government employee who, until November 1, 1945, made all managerial decisions for R-B (R. 28-29, Ex. P-69, p. 58).[15] Upon taking control of R-B,

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[15] Buergi was retained in an advisory capacity for one month but thereafter had no further connection with R-B's operations

this Federal Operating Manager placed on all R-B's motor equipment stenciled signs which read as follows: "Property of the United States, operated by the Federal Manager all properties of R-B Freight Lines Inc." (R. 29). The Federal Operating Manager had a complete inventory and appraisal made of R-B's property and opened complete new sets of books showing operations as being for the account of the United States (R. 29, Ex. P-69, pp. 52, 58). He attached Government license plates on R-B motor equipment in substitution for the state plates previously attached (R. 29). He sought and obtained exemption from the payment of taxes (R. 29). He arranged for new liability insurance contracts, so that the insurers could not set up government immunity as a defense to claims (R. 29, Ex. P-69, p. 52).

In addition, the Federal Operating Manager (1) transferred the funds in R-B's bank account to a new account opened in his name (Ex. P-69, p. 52); (2) obtained supplies through the Procurement Division of the Treasury Department (Ex. P-69, p. 55); (3) had leases held by R-B transferred to him (Ex. P-69, p. 54); and (4) asserted that R-B was immune from process as well as from various state taxes on the ground that it was a federal instrumentality (Ex. P-69, pp. 58, 57-62).[16]

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until R-B's release from control on November 1, 1945 (R. 28). G. W. Rickerd, R-B's president, (*supra*, p. 7, fn. 5), continued with R-B during the entire period of the seizure (Tr. 964).

[16] On the eight carriers (including R-B) the management of which was taken over by the Government, see finding 42 of

C. *Values for Just Compensation:* 1. *Rental Value of Equipment:* The Commission found that on August 11, 1944, there was a critical shortage of motor vehicles of all types, with a need for such vehicles for the hauling of industrial products and agricultural commodities and for military use (R. 30); that there was a sharp demand for vehicles of the type owned by R-B, all of which were suitable for leasing; and consequently that, on August 11, there existed a rental market for each and every piece of R.B's vehicle equipment, which rental market was in no way affected by the strike of over-the-road drivers (R. 30).

Since, as found by the Commission, (1) the reasonable net rental value [17] of R-B's 14 tractor-trailers combinations [18] and for its 4 trucks was 7 cents per mile, (2) the net rental value of R-B's additional tractor without trailer was 5 cents per mile, and (3) all these vehicles would have been leased for a minimum use of 5,000 miles per month per vehicle, the total market net rental value of all this motor equipment for the 14⅔ month period from August 11, 1944 to November

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the Court of Claims in *Wheelock Bros., Inc.* v. *United States*, 115 C. Cls. 733, 769, and the Government's brief in the *Wheelock* case, Nos. 169, 177, Oct. Term, 1950, at p. 36.

[17] "Net rental value" as used by the Commission is a rental rate out of which the lessor would not be obligated to pay any of the operating expenses (R. 50).

[18] 10 of these tractor-trailor combinations were used for the transportation of general commodities in inter-city service and 4 were used for the transportation of petroleum products (R. 29).

1, 1945, was determined to be $96,066.65 (R. 30).[19]

As to R-B's 8 pick-up and delivery trucks, the Commission found that they could be rented for a minimum of 10 hours a day, six days a week, at $1.11 an hour, or a total net rental value for the period of the seizure of $33,566.40 (R. 30-31). The net rental value of R-B's 1927 Yellow Coach passenger bus was determined at $22 per day; since this bus was used only until November 2, 1944, a period of 83 days, when it was replaced by another bus, the net total rental value of the Yellow bus was computed at $1,826 (R. 31).

R-B owned certain office machines and equipment for which the Commission found a value of $5,272.70 and since the market rental value of this equipment was determined by the Commission to be 10% of its value per month, the Commission fixed its total rental value for the 14⅔ months at $7,704.94 (R. 31). The total net market rental value of R-B's motor and office equipment was, according to the Commission's findings, $139,-163.99 (R. 33).

2. *Additional Compensation:* The Commission further found (1) that during the period from August 11, 1944 to November 1, 1945, R-B's current assets and deferred debits decreased in the

[19] This figure was computed as follows: The total mileage for the 18 trucks and tractor-trailors is 1,320,000 (18 x 5,000 x 14⅔) which, if multiplied by 7 cents per mile, gives a result of $92,400.00. To this is added $3,666.65, which was arrived at by multiplying the 5 cents per mile for the tractor without trailer by the mileage of 73,333 (5,000 x 14⅔).

total amount of $15,038.91 as the result of use and consumption by the Government (R. 31); (2) that the Government by neglect and failure to repair caused damage to R-B's motor equipment, over and above ordinary wear and tear, in the amount of $13,246.04 (R. 31-32); and (3) that the Federal Manager had cancelled and terminated, on March 25, 1945, a contract which R-B had had for the transportation of petroleum products of Socony Vacuum Oil Company, causing R-B damage in the amount of $2,500 (R. 32).

3. *Operating Ratios*[20] *and Value of Property:* The evidence shows that those with experience in the trucking industry, such as the regulatory commissions, the lending institutions, and the operators themselves, evaluate the condition and value of a particular motor carrier system by its operating ratio (Tr. 235 *et seq.*, 332-4, 925-8, 1101, Ex. R-49). R-B's experience for the four-year period prior to the seizure shows that it had an operating ratio of 99.34 for 1941 with a net operating profit of $1,229.26, an operating ratio of 100.10 in 1942, 100.24 in 1943, and 102.42 in 1944, with

[20] Operating ratio, as used in the trucking industry, is the relationship between operating expenses (excluding interest and income taxes) and operating revenues. An operating ratio of less than 100 indicates operating profit whereas an operating ratio greater than 100 indicates that the business had been operated at a loss. The number of points by which the operating ratio is less or greater than 100 indicates roughly the percentage of profit made or loss incurred, respectively, during the period covered.

operating losses of $227.85, $661.00 and $6,443.00,[21] for each of those years, respectively (Ex. R-49).[22]

The evidence further shows that on August 11, 1944, R-B's balance sheet, according to its books, showed its total assets for the entire business to be $103,493.70, its motor and other equipment being valued at about $54,000 and its liabilities at about $45,000 (Ex. R-52; Ex. P-40, p. 24). In addition, R-B had estimated the market value of all its assets on that day to be $237,732.75, the value of its motor and other equipment at about $125,000 roughly, and the same liabilities of $45,000 (Ex. R-52, Ex. P-40, pp. 1, 24).

On November 1, 1945, when R-B was released from control, its balance sheet, according to its books, showed a total asset value of $70,547.09 (Ex. P-45, p. 17), whereas its total asset market value, according to R-B's appraisal, was $141,-103.50 (Ex. P-42, p. 1). The decrease in value during the control period shown by R-B's appraisal was, except for operating losses for the period, wholly the result of the sharp drop in the market value of R-B's principal asset, motor equipment, between August 11, 1944 and November 1, 1945 (Tr. 399 *et seq.*).

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[21] R-B's net loss for the period from January 1, 1944 to August 11, 1944, was about $3,000 (Ex. P-40, p. 27; Ex. R-40; Tr. 1470, 1536).

[22] In 1942, R-B's operating revenues aggregated $230,719.10, whereas its operating expenses amounted to $230,946.95. In 1943 these figures were $274,056.00 and $274,717.00, and in 1944 they were $265,470.00 and $272,413.00, respectively (Ex. R-49).

In its opinion, the Commission relied on *United States* v. *United Mine Workers*, 330 U.S. 258, the circumstances of which, the Commission thought, were "substantially the same as existed in the case before us" (R. 38), and ruled that there was a taking of R-B not only after January 1, 1945 (which the Government had conceded) but also prior thereto, *i.e.*, from August 11, 1944 (R. 40-41). "The taking," the Commission stated, "was as complete on August 12 as it was on January 1" (R. 40).

As to just compensation, the Commission held that fair rental value was the proper measure for the entire period of the seizure. In fixing fair rental value, the Commission ruled that it was immaterial whether the taking was of R-B's "business * * * as a going concern", as distinguished from the individual items of tangible and intangible property belonging to R-B, for, according to the Commission (R. 42-43).

> It seems that the rental value of [R-B's] business, including all its property, should not be less, even if treated as a going concern, than the total rental of its component parts. But it is to be borne in mind that upon the Government's taking on August 11, 1944, [R-B] was deprived of property which it had no obligation to continue to use in the common carrier business. It was considering other possible uses which it deemed more profitable. * * * Thus [R-B], in being de-

> prived of its property, was deprived of the right to determine what use should be made of its property.

Asserting it to be the rule that "fair market value * * *, which in this case would be fair market rental value," should be based on "the uses to which the property is adaptable and can reasonably be expected to be needed" (R. 43), and noting that there was a substantial rental market for R-B motor equipment as well as a rental market for its office equipment,[23] the Commission proceeded to use the fair net rental value of this equipment ($139,163.99), as found by it (*supra*, pp. 17-18), as the measure of the prescribed compensation (R. 44-48).

The Commission went on to hold that R-B was entitled, as additional compensation, to (1) $15,030.91 for the consumption of current assets (*supra*, pp. 18-19), (2) $13,246.44 for damage to revenue equipment beyond ordinary wear and tear (*supra*, p. 19), and (3) $2,500.00 for destruction of R-B's rights under the petroleum transportation contract (*supra*, p. 19), a total of $30,784.95 (R. 49-50), thus increasing the award to $168,906.58.[24] Since the United States was entitled to

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[23] The Commission stated: "We are satisfied, also that there was a rental market for [R-B's] office equipment" (R. 43).

[24] The original award was actually $169,948.94 but the Commission, on R-B's motion for amendment of the final determination, reduced it by $1,142.36 to the amount set out in the text (R. 54, 55).

credits in the amount of $48,088.60,[25] the Commission ruled that $120,717.58, plus interest as a part of just compensation, was due to R-B from the United States.

REASONS FOR GRANTING THE WRIT

This case, the first decided by the Motor Carrier Claims Commission, raises some of "the difficult problems inherent in fixing the value [for just compensation purposes] of the use of a going concern" (*United States* v. *Pewee Coal Co.*, 341 U.S. 114, 117), which this Court found it unnecessary to consider in *Pewee* and in *United States* v. *Wheelock Bros.*, 341 U.S. 319, but which will probably be presented in each of the 103 cases now before the Motor Carrier Claims Commission. In this case, the Government seized R-B's motor carrier transportation system along with 102 other motor carriers in order to put an end to the work stoppage which was threatening to hinder the successful prosecution of the war by crippling motor carrier transportation in the midwest. As was true with most of the other motor carriers involved in this seizure, the Government's control for the period prior to January 1, 1945, was not intended to, nor did it in fact, interfere with the normal operation of R-B's business by its own management. However, in this case, as well as in the case of seven

[25] The Commission found the Government entitled to credits: (1) for its payments of R-B's liabilities in the amount of $31,536.03 and (2) for the new equipment it delivered to R-B which, on November 1, 1945, had a value of $16,552.57 (R. 50-51).

other of the seized motor carriers, the Government found it necessary (on January 1, 1945, in this case) to remove the former management and thereafter to operate the business as a government instrumentality.

Although we agree that a "taking" occurred subsequent to January 1, 1945, the date on which R-B's management was removed, we believe to be unsound the holdings of the Commission (1) that a taking of R-B's motor carrier system occurred prior thereto, during the period that R-B continued in normal operation under its customary management, and (2) that the just compensation due for the entire taking (*i.e.*, for both the period before and after January 1, 1945) was about $170,000, measured principally by the rental value ($139,-163.99) of R-B's revenue and office equipment. These holdings of the Commission, which under the *Wheelock* decision has exclusive jurisdiction over the motor carrier claims filed with it, establish the principles which will govern the Commission in its disposition of the 102 other claims pending before it and, if not corrected, will result in subjecting the United States to unwarranted liabilities aggregating tens of millions of dollars.

We seek review both because of the importance of these problems in the novel field of temporary takings,[26] and in order that the Commission's determinations may comply with the requirement that

[26] Cf. *United States* v. *General Motors Corp.*, 323 U.S. 373, 374; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 4.

the awards be " 'just' both to an owner whose property is taken and to the public that must pay the bill." [27] The principles approved by this Court, if certiorari is granted, will undoubtedly control the disposition of the large number of cases remaining before the Commission for decision.

A. *Just Compensation*: The Commission's determination of just compensation is, we believe, erroneous on two counts. First, the Commission failed to recognize that, assuming there was a taking on August 11, 1944, just compensation for the earlier take-over (*i.e.* prior to January 1, 1945), unlike that for the later take-over (subsequent to January 1), should be measured by the actual out-of-pocket loss caused by the Government's actions, rather than by the "rental value" rule which it purported to apply. Secondly, the Commission grossly misapplied the "rental value" rule, even assuming it applied to both take-overs, by equating rental value of the business, which was taken as a whole, to that of the sum of its individual components rented separately, with the result that the award given R-B is wholly disproportionate to the damages or loss incurred.

1. *The earlier take-over period*: "Rental value" is inapplicable as the compensation measure for the earlier taking for the reason that during this period R-B did not suffer the actual ousting from posses-

[27] *United States* v. *Commodities Corp.*, 339 U.S. 121, 123; see, also, *e.g.*, *United States* v. *Cors*, 337 U.S. 325, 332; *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 280.

sion and control—the loss of use and enjoyment—for which rental value is intended to compensate in taking cases. By this taking, R-B was subjected to far less interference with its possession and use of the property than is involved in the "rental value" type of taking, and, consequently, R-B suffered far smaller losses than "rental value" is designed to cover.[28]

(a). The "rental value" rule, which is actually no more than a reformulation for temporary takings of the "market value" standard generally applied as the measure of just compensation, is applicable to situations where the Government temporarily takes the property for its own exclusive use and thereby ousts the prior occupant of the property completely from possession and control of the property. *United States* v. *General Motors Corp.*, 323 U.S. 373; *United States* v. *Petty Motor Co.*, 327 U.S. 372; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1; *United States* v. *Westinghouse Co.*, 339 U.S. 261. As a result of this ousting, the prior occupant loses, for the period of the taking, the right to possession and use of the property, which he would have had if there had been no taking. Rental value is intended to com-

[28] In *Wheelock Bros., Inc.* v. *United States*, 115 C. Cls. 733, 788-9, reversed on jurisdictional grounds, 341 U.S. 319, the Court of Claims rejected "rental value" as the standard of just compensation in a case wholly comparable with the take-over of R-B in the period prior to January 1, 1945. There is, thus, a square conflict between the Motor Carrier Claims Commission and the Court of Claims on this point.

pensate him for this actual loss suffered as a result of Government's taking his "right to occupy, for a day, a month, a year, or series of years, [which] in and of itself * * * has a value" (*United States* v. *General Motors Corp., supra,* at 380), and, therefore, "the measure of the damages must be limited to the value of this temporary occupancy, as though the claimant had leased and the government had rented the premises." *Johnson* v. *United States,* 2 C. Cls. 391, 416.

Here, however, during the period of the earlier taking R-B did not suffer this ousting from possession and control and loss of use and enjoyment. The Government did not so take R-B's business as to oust R-B in any substantial degree from possession, control, or management. On the contrary, as we have shown, *supra,* pp. 13-15, R-B was not only permitted but encouraged to retain possession and control of the business; it continued to operate its motor carrier system in most respects as it did prior to the seizure and was required to conform to the directions of the Federal Manager only in very limited measure.

(b). Taking together the opinions of Mr. Justice Burton and Mr. Justice Reed in *United States* v. *Pewee Coal Co.,* 341 U.S. 114, it would seem that a majority of the Court have already questioned, at the least, whether in this type of taking the award can exceed the claimant's actual loss, or should ever be based on an artificial "rental

value". The dissenting justices in *Pewee* (the Chief Justice, Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Minton) indicated their views by approval (1) of the statement in the comparable case of *Marion & R. V. R. Co.* v. *United States,* 270 U.S. 280, 282, to the effect, "Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss" (341 U.S. at 122), and (2) of the dissent in the Court of Claims that "the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts" (*ibid.*).

The problem is spelled out more in detail in Mr. Justice Reed's concurrence in the much more restricted award of the Court of Claims in *Pewee.* The Justice there distinguishes between the form of temporary taking where the prior occupant, having been completely ousted from possession, may be entitled to "rental value", and the form which there is substantially less interference with the occupant's use and possession of the property.[29]

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[29] "Temporary takings can assume various forms. There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses. *United States* v. *General Motors Corp.*, 323 U.S. 373; *United States* v. *Petty Motor Co.*, 327 U.S. 372; *Kimball Laundry Co.* v. *United States,* 338 U.S. 1. A second kind of taking is where, as here, the Government, for public safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its

As to the latter type of temporary taking, the just compensation is to be measured, according to Mr. Justice Reed, by the losses occasioned by the Government's actions (341 U.S. at 121):

> "* * * the Government's supervision of a losing business for a temporary emergency ought not to place upon the Government the burden of the losses incurred during that supervision unless the losses were incurred by governmental acts, *e.g.*, if the business would not have been conducted at all but for the Government, or if extra losses over what would have been otherwise sustained were occasioned by Government operations. Where the owners' losses are what they would have been without the 'taking', the owner has suffered no loss or damage for which compensation is due."

(c). Measuring R-B's compensation for the pre-January 1, 1945 taking by the losses caused by the Government's action, rather than "rental value", is in complete accord with the basic principles of

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direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company. Examples are the operation of railroads, motor carriers, or coal mines. *Marion & Rye Valley R. Co.* v. *United States*, 270 U.S. 280; *United States* v. *United Mine Workers of America*, 330 U.S. 258.

"When, in a temporary taking, no agreement is reached with the owners, the courts must determine what payments the Government must make. Whatever the nature of the 'taking,' the test should be the constitutional requirement of 'just compensation.' However, there is no inflexible requirement that the same incidents must be used in each application of the test." (341 U.S. at 120-121).

just compensation. There is nothing in the Constitution requiring the use of any particular standard or measure of payment, be it "market value," "rental value" or "value" of any type; on the contrary, the various rules which have been evolved are only practical working rules, applicable only in so far as they reflect, in light of all pertinent considerations, the just compensation, payable in that type of situation. Cf. *United States* v. *Cors,* 337 U.S. 325, 332; *United States* v. *Toronto Nav. Co.,* 338 U.S. 396, 402; *Kimball Laundry Co.* v. *United States,* 338 U.S. 1, 4-5. All these rules, which have as their purpose the striking of a balance "between the public's need and the claimant's loss" (*United States* v. *Toronto Nav. Co.,* 338 U.S. 396, 402), are, however, governed by the fundamental principle that the owner is not to receive an award greater than the losses occasioned by the Government's actions.[30] Accordingly, "since the owner is to receive no more than indemnity for his loss" (*United States* v. *Miller,* 317 U.S. 369, 375),[31] to give R-B an award

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[30] *Bauman* v. *Ross,* 167 U.S. 548, 574; *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 76; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U.S. 299, 304; *United States* v. *New River Collieries Co.,* 262 U.S. 341, 343; *Brooks-Scanlon Corp.* v. *United States,* 265 U.S. 106, 126; *Standard Oil Co.* v. *So. Pacific Co.,* 268 U.S. 146, 155; *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U.S. 280, 282; *Olson* v. *United States,* 292 U.S. 246, 255; *United States* v. *Miller,* 317 U.S. 369, 373-375; I Bonbright, *Valuation of Property* (1937), pp. 408-409; McCormick, *Damages* (1935), § 44.

[31] We, of course, do not suggest that all losses suffered by the claimant are compensable under the Fifth Amendment (see,

based on "rental value" would allow it compensation clearly in excess of its loss, in violation of these well-established principles.

2. *The appropriate "rental value."* (a). The Commission committed further error by determining rental value for both types of taking entirely upon the basis of the rental value of R-B's motor and office equipment, to which it added compensation for diminution in current assets and costs of putting the equipment in serviceable condition.[32] For what was taken by Government—and what is compensable under the Fifth Amendment—is the temporary use of R-B's entire business, which until the work stoppage had been an operating motor carrier system, and not a conglomeration of current assets, motor and office equipment, without more. *Wheelock Bros. Inc.* v. *United States*, 115 C. Cls. 733, 788, reversed on other grounds, 341 U. S. 319; cf. *Coombs* v. *United States*, 106 C. Cls. 462, 475. The business which the Government took included, in addition to the current assets and the

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e.g., *United States* v. *Miller*, 317 U.S. 369, 375; *United States* v. *General Motors Corp.*, 323 U.S. 373, 379-380), but merely that the losses occasioned by the Government's taking set the maximum recoverable as just compensation.

[32] To the $139,163.99 awarded as rental value, the Commission added (1) $15,038.91 representing the decrease in current assets and deferred debits from August 11, 1944 to November 1, 1945; (2) $13,246.04 for the cost of repairs and replacement of parts found to be necessary to place the equipment in serviceable condition; and (3) $2,500 for termination of a contract with Socony Vacuum Oil Company for the transportation of petroleum products. We do not question the last two items. Cf. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 7. The total of $139,163.99 and $15,038.91 is $154,202.90—the gross award we challenge. See *supra*, pp. 17-19.

motor equipment which comprised the principal revenue producing assets, a substantial number of liabilities and expenses. These expenses are as much a part, although a less desirable part, of R-B's motor carrier system, and it is plain that, without such expenses, the motor equipment could not be utilized in the business to produce revenue. To predicate the rental value of the motor carrier system, as the Commission did, principally on the basis of diminution of current assets and the rental value of the individual items of motor and office equipment, without deducting all the costs necessarily incurred as an incident to operating the business, is to ignore the substantial expenses involved in obtaining that revenue.

(b). The excessiveness of the award fixed by the Commission may be illustrated from R-B's own history. In contrast to the compensation of roughly $155,000 awarded by the Commission, it is significant that R-B—using not only its motor and office equipment together with its current assets but also its franchise rights, its realty and personal property, its investment, and the business skill and service of its owners—suffered a net loss for the four-year period of 1941-1944. During this period, immediately preceding the seizure, R-B showed net operating profit only in 1941, and then only in the amount of $1,229.26; for that year, its operating ratio was 99.34 (Ex. R-49, *supra,* p. 19). During the remainder of the period, R-B operated at a loss, with operating ratios of 100.10 in

1942, 100.24 in 1943, and 102.42 in 1944 (Ex. R-49, *supra,* pp. 19-20). In the light of these losses and limited profits for the four-year period prior to the seizure, it hardly seems likely that an informed person would be willing on a free market to pay a rental of about $155,000, as found by the Commission, for R-B's business for the 14⅔ months of the seizure, particularly when it is remembered that wartime conditions made it increasingly difficult, rather than easier, to conduct trucking operations at a profit.[33] Cf. *United States* v. *Toronto Nav. Co.,* 338 U. S. 396, 403; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 8-9, 16-19. And it is plain that, despite the Commission's failure to accord any weight to this factor, R-B's operating ratio would have played an important, if not controlling, part in any evaluation of the rental value of the business by an informed lessee, for these ratios provide the guide by which those concerned with the trucking industry, such as the regulatory commissions, the lending institutions, and the operators themselves, evaluate the condition and soundness of a particular motor carrier system (*supra,* p. 19).

Comparison of the rental value awarded by the Commission with the value of the business on August 11, 1944, the date of seizure, likewise reveals

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[33] Nationally, the average operating ratio for motor carriers was 94.62 in 1941; 93.63 in 1942; 96.93 in 1943 and 98.46 in 1944 (Ex. No. R-49).

the extravagance of the award. According to its books, R-B's balance sheet on August 11 showed a total asset value for the entire business of $103,493.70 (Ex. R-52, Ex. P-40, p. 24) and its gross revenues for the four-year period prior to the seizure averaged about $250,000 (*supra,* p. 20, fn. 22). In addition, R-B has estimated the market value of all its assets on that day to be about $238,000.00 (Ex. R-52, Ex. P-40, pp. 1, 24). The $155,000 award made by the Commission is, thus, more than one and one-half times R-B's book value, about two-thirds its gross operating revenues for the prior four-year period, and more than two-thirds of even the market value appraisal submitted by R-B.[34] When the assets and revenues are reduced to take into consideration liabilities and expenses, respectively (see *supra,* pp. 19-20 and fn. 22), the Commission's award becomes about 300% of R-B's net assets as per books, and about 80% of R-B's net assets as appraised by it; it is impossible to formulate a comparison between the award and R-B's average net profits during the four-year period prior to the seizure, for during that period, R-B was losing money rather than earning profits. These figures, taken in conjunction with the fact that R-B's principal assets were its motor equipment (trucks,

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[34] Unlike *Kimball Laundry,* where during the taking the company's facilities were diverted from its prior civilian market and used solely to satisfy government demands, R-B's service to the public, including those shippers which it had served prior to the seizure, was not in any way curtailed by virtue of the take-over.

tractors and trailers) whose average service life apparently was more than five years,[35] and included a 1927 Yellow bus which R-B had purchased second-hand in 1942 and had used since that time for 23 months, plainly indicates that an award of the magnitude allowed by the Commission does not comport with the idea of fairness and substantial justice to the public as well as the individual property owner on which the Fifth Amendment's prescription of just compensation is based. See, *e.g.*, *United States* v. *Commodities Corp.*, 339 U. S. 121, 123-124; *United States* v. *Cors*, 337 U. S. 325, 332; *United States ex rel TVA* v. *Powelson*, 319 U. S. 266, 280; *United States* v. *Miller*, 317 U. S. 369, 373, 374-375; *Bauman* v. *Ross*, 167 U. S. 548, 574.

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[35] Most of R-B's 13 trucks were made prior to 1940, purchased by it second-hand and by August 11, 1944 had been used by it an average of 27 months. All but one of its 15 tractors (the 15th tractor was acquired on August 1, 1944) had been in R-B's service for an average of 41 months; four tractors, only one of which had been purchased new, having already given 60 or more months of service. The 14 trailers had been in R-B's service, on the average, for 38 months. See Exhibit R-36. Despite this extensive use by R-B, their original cost of the trucking equipment amounting to about $85,000 had been reduced, according to the books, by depreciation to a figure of about $47,000 (Exhibit R-30, p. 4). R-B's appraisal makes no deduction for depreciation (Exhibit P-40, p. 1).

In this connection, it may be noted that the Commission's award of rental value of the motor equipment ($139,163.99) was one and one-half times its original cost; about three times the depreciated cost per books as of August 11, 1944; and about one and one-tenth times the market value as estimated by R-B. An extreme example of the Commission's failure to apply proper just compensation standards is its allowance of $1,826.00 as the rental value for 83 days of the 1927 Yellow bus, which was appraised both in the books and in R-B's estimate at only $75.00. (Ex. P-40, p. 86).

(c). The Commission was also largely misled into fixing this award by its erroneous view that since, as it found, R-B's equipment could be rented at a high rate, rental constituted the "best use" to which the "property" could be put. For, even if one assumes that in face of the competition of the 102 other struck motor carriers R-B could have rented its motor and office equipment for the full period of the seizure at the net rates found by the Commission, it does not follow that in the eyes of "the ordinary businessman in the trade" (*United States* v. *Toronto Nav. Co., supra* at 406), which, rather than the desires of R-B's owners, is the governing standard,[36] such rental of individual units constituted the best use of the equipment.

The seized carriers, along with R-B, had determined, by virtue of their being in the trucking rather than the rental business, that normally the use of the equipment for trucking was at least as good a use as rental. To this should be added the fact that the taking was only of the temporary use of the business after which it was to be returned to its owner. These considerations, plus the further fact that the high rental value was the result of a temporary distortion of the rental market due to the wartime truck shortage, plainly indicates that an ordinary businessman in the trucking business would have rejected the prospects of temporary,

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[36] For this reason, the fact that R-B's general manager testified that when the drivers went on strike, the Board of Directors had voted to liquidate (Tr. 125) is irrelevant.

high rental profits and considered the best use of his trucks to be in the trucking business to which in fact he devoted them in most instances during the entire war period, including the period here involved. By renting his equipment, the operator of a motor carrier knew not only that he would run the risk of forfeiting his operating rights for failure to "render reasonably continuous and adequate service to the public" (see, *e.g.*, Exhibit P-87, Tr. 1817), but also that he stood to lose his motor carrier system which, as a going business, was not merely a conglomeration of physical assets but included as well various intangibles which take considerable time to develop. The ordinary businessman would know that, once the abnormal rental demand had ceased, and he was confronted with returning to trucking, he would have to start afresh. Apart from the probable necessity of obtaining new operating authorities, he would again have to incur the losses which typically accompany new ventures in a highly competitive field, such as the midwest trucking industry, and in addition run the risk of not recapturing his previous position in the industry. Cf. *Wheelock Bros. Inc.* v. *United States*, 115 C. Cls. 733, 788, reversed on other grounds, 341 U. S. 319.

This *a priori* conclusion is fully supported by the actual facts. The lucrative rental market existed prior to the government seizure. Yet, despite the prospects offered by the rental market, all of the

seized 103 motor carriers, including R-B, resisted the allure of the alleged temporary windfall available by renting, and continued instead in the trucking business. By failing to take advantage of the high rental market, the motor carriers plainly manifested that, as far as they were concerned, the best use of their trucks was not in renting but rather in their established trucking business.

Moreover, even if the ordinary trucker would have diverted his trucks to rental, it was improper to measure the just compensation prescribed by the Fifth Amendment by the enhanced rental rate then available for motor equipment, for the reason that the enhanced rate was largely the result of the Government's purchasing of most of the reduced production of new motor equipment for its wartime needs (Tr. 388-392, 394-6, 472-3, 479-980). The consequent acute scarcity of equipment available for civilian uses brought about sharp competition for motor equipment for both permanent use by purchase and temporary use by rental, with rental value spiraling to a level far out of line with normal values. In these circumstances, the enhanced rental value in this sellers' market plainly did not represent "what 'a willing buyer would pay in cash to a willing seller,' *United States* v. *Miller* [317 U. S. 369], 374, in a fair market" (*United States* v. *Cors*, 337 U. S. 325, 333), but represented what could be exacted from the public for a commodity, the civilian supply of which had become

scarce because of the wartime demands and restrictions of the Government. As stated in the *Cors* case (337 U. S. at 334), that is "a hold-up value, not a fair market value" and, hence should not have even been considered as an element in the Commission's determination.

B. *Taking*: While we do not question that R-B's motor carrier system was "taken" for the period from January 1, 1945, when R-B's management was replaced, to November 1, 1945, when government control was released, we believe that the Commission's holding that there had been a taking prior thereto is unsound. For the record shows (see also *supra*, pp. 13-15 and fn. 13) that R-B continued to operate in the same manner as before the seizure, with its management during this period remaining virtually exclusively under the direction of its officers, who continued to perform the same supervising and managerial functions they had previously performed. In these circumstances, the facts fall short of showing such an interference with, or destruction of, R-B's ownership, possession or use of its property as to support the Commission's conclusion. See the discussion in the Petition (pp. 18-24) and Brief for the United States (pp. 24-55) in *United States* v. *Wheelock*, No. 169, October Term, 1950.

We, of course, are aware that in *United States* v. *Pewee Coal Co.*, 341 U. S. 114, the Court has held that the 1943 seizure of the coal mines resulted in a "taking." However, we believe that there are dis-

tinctions between *Pewee* and the instant case which the Court may view as significant. For example, unlike *Pewee*, no American flags were required to be flown over the property nor were placards reading "United States Property" posted on the premises (though signs were placed on the terminals stating that they were in the "possession" of the Government). In addition, there was no "Order for Taking Possession" and no formal appointment of operating managers for each of the seized enterprises. Moreover, unlike the Coal Mine Regulations, the Federal Manager's Operations Order No. 1 provided that "Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive * * *" (R. 22), Appendix B, *infra*, p. 47. Finally, unlike the coal mines, the motor carriers, prior to the seizure, were subject to governmental regulation as public utilities under the Motor Carrier Act of 1935 (49 Stat. 543, as amended, 49 U.S.C. 301, *et seq.*) and many of the actions taken by the Federal Manager were within the provisions of that Act. These differences, plus others which we will develop in the brief on the merits, indicate, we submit, that despite *Pewee*, there was probably no "taking" here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

APPENDIX A

1. Act of July 2, 1948, 62 Stat. 1222:

AN ACT

To create a commission to hear and determine the claims of certain motor carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established a Motor Carrier Claims Commission, hereafter referred to as the Commission.

Sec. 2. The Commission shall hear and determine, according to law, existing claims against the United States arising out of the taking by the United States of possession or control of any of the motor-carrier transportation systems described in Executive Order Numbered 9462, dated August 11, 1944 (C.F.R., 1944 Supp., p. 70). The settlement of any claim prior to the enactment of this Act shall not prevent the Commission from hearing and determining such claim if it determines that the principles of equity as administered by the courts require that such settlement be set aside and that such claim be heard and determined.

Sec. 3. The Commission shall consist of a Chairman and two other members, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall each receive a salary of $15,000 per year. At least two of such members shall be learned in the law. Each member shall take an oath to support the Constitu-

tion of the United States and to discharge faithfully the duties of his office. The members shall hold office until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

Sec. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

Sec. 5. The Commission shall meet at such times and places as it may prescribe, shall keep a full written record of all its hearings and proceedings which shall be open to public inspection, and shall have power to establish its rules of procedure.

Sec. 6. The Commission shall receive claims for a period of six months after the date of enactment of this Act, and not thereafter. The jurisdiction of the Commission over claims presented to it as provided in section 2 of this Act shall be exclusive; but nothing in this Act shall prevent any person who does not elect to present his claim to the Commission from pursuing any other remedy available to him. The Attorney General or his assistants shall represent the United States in all claims presented to the Commission.

Sec. 7. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chairman, may administer oaths and examine witnesses. Any member of the Commission may require by subpena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing; or (2) the taking of depositions before any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking oral testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States.

Sec. 8. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

Sec. 9. (a) When the final determination of the

Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. Such determination shall be subject to review in the same manner as is provided for cases in the Court of Claims upon application to the Supreme Court within three months from the date of the filing of such determination with the clerk.

Sec. 10. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Supreme Court; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

Sec. 11. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of, and be paid in the same manner as is provided for, a final judgment of the Court of Claims.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

Sec. 12. The Commission shall determine all claims presented to it as expeditiously as possible, and shall make a report to Congress of its progress not later than the fifteenth of April of each year until its dissolution.

Sec. 13. The existence of the Commission shall terminate at the end of two years after the first meeting of the Commission or at such earlier time after the expiration of the six months' period of limitation set forth in section 6 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States.

Approved July 2, 1948.

2. The Act of August 13, 1948, 62 Stat. 1289, 1290, substituted "nine months" for "six months" in Sections 6 and 13.

3. The Act of May 24, 1949, 63 Stat. 80 (Pub. L. 71, 81st Cong., 1st Sess.) substituted "fifteen months" for "nine months" in Sections 6 and 13.

APPENDIX B

Operations Order No. 1, issued by the Federal Manager, which is reproduced in the findings below (R. 21-25), provided:

> 1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate, partnership, individual, or trade

name, as the case may be, and by means of the instrumentalities, agents, officers, and employees customarily employed by you, as fully as if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general orders, rules, regulations, and directions, which may be issued thereunder. Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purpose of operation and of said Executive Order.

2. Each motor carrier shall forthwith indicate its acceptance or rejection of the directions contained in section 1 of this Operations Order No. 1. Such acceptance or rejection shall be in writing, signed by the owner or duly authorized agent, and shall be addressed to the Federal Manager. Such acceptance or rejection by a corporate motor carrier shall be accompanied by a certified copy of a resolution adopted by its Board of Directors, or other governing body, accepting or rejecting the directions contained in said section 1.

3. All personnel, officers, agents, and employees, employed by you in the operation of the said system, are called upon to resume or continue the performance of their usual duties and in the customary manner until otherwise ordered. No such officer, agent, or employee

shall be deemed to be an official or employee of the United States.

4. Subject to the terms of said Executive Order, and except as hereinafter provided, wage scales and working conditions in effect on the effective date of this order shall be maintained, and full recognition shall be given to the rights of the employees and all classes thereof. Each carrier shall observe the terms and conditions of the Directive Order of the National War Labor Board dated February 7, 1944, provided that wage increases provided for by the said Directive Order of the National War Labor Board, which accrued prior to the taking possession of its motor carrier transportation system pursuant to said Executive Order, shall be paid only out of the net operating revenue of said system. If, at the expiration of ninety (90) days from the date of this Operations Order No. 1 it appears that the net operating revenue of the motor carrier transportation system of any carrier, possession of which is so taken, is, or will be, insufficient to pay the said accrued wage increases provided for by the said Directive Order of the National War Labor Board, such carrier shall make a report to the Federal Manager with respect thereto. Nothing in this order shall be construed so as to prevent or preclude any carrier from paying said accrued wage increases out of any other funds or assets available to it which are not necessary for the operation of its transportation system.

5. All deductions for the benefit of employ-

ees now being made by law or agreement, including insurance payments, Social Security and Unemployment Compensation deductions, and other deductions of every kind, and all arrangements governing the payment of wages, including war bond purchase plans, shall be continued, subject to any legal right of discontinuance.

6. Each motor carrier shall maintain its books and records in such manner that all transactions occurring after 12:01 A. M. of August 12, 1944, and during the period its system and properties are in the possession of the United States, shall be separate, or may be readily separated, from the previous transactions. Customary accounting procedures may be followed, and the records and books of account currently in use may be used so long as all transactions may be separated as provided in this section. Each motor carrier shall make such reports as the Federal Manager may, from time to time, request.

7. The operation of any motor carrier transportation system hereunder shall be in conformity with the Interstate Commerce Act, as amended, and other applicable existing Federal and State Laws, Executive Orders, and local ordinances, and rules and regulations issued pursuant to such laws, Executive Orders, or ordinances. Each motor carrier shall be deemed to remain subject to suit in the same manner and to the same extent as it was so subject prior to the possession of its system and properties by the United States. However, except with the prior written con-

sent of the Director of the Office of Defense Transportation, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property, or other assets, tangible or intangible, in the possession of the United States under said Executive Order. No motor carrier shall authorize or bring suit, accept service, or enter any legal proceedings on behalf of the United States, the Director of the Office of Defense Transportation, or the Federal Manager. Information as to the pendency, necessity, or probability of any legal proceedings which in any manner questions any right of the United States, the said Director or Federal Manager, shall be promptly furnished to the Federal Manager. Criminal laws protecting properties of the United States shall be deemed applicable to the system and properties of any motor carrier in the possession of the United States under the Executive Order.

8. If any regulation, order, direction, or instruction issued by the Federal Manager, or by any of his representatives, interferes with the accomplishment of the purpose for which possession and control are taken hereunder, the management of any motor carrier affected thereby shall promptly notify the Federal Manager and request a waiver or modification of such regulation, order, direction, or instruction.

9. Except and to the extent that a motor carrier objects to any action that it is required to take, pursuant to this or any other order,

rule, regulation, or direction, of the Federal Manager, or of any of his representatives, pertaining to possession, control, and operation, under said Executive Order, such action and the consequences thereof shall be the sole responsibility of the motor carrier. Failure to object to any such required action in the manner provided in section 10 hereof shall be deemed to be a waiver of the right of the motor carrier to assert any claim for liability against the United States or its officers or agents with respect to damage allegedly resulting from any specific action so taken by it.

10. (A) Any motor carrier which objects to assuming sole responsibility with respect to action which it is required to take pursuant to this or any other order, rule, regulation, or direction, issued by the Federal Manager, or by any of his representatives, pertaining to possession, control, and operation, under the said Executive Order, shall protest such order, rule, regulation, or direction, to the Federal Manager, in writing, and in such protest shall specify:

(I) The particular order, rule, regulation, or direction, which the motor carrier protests:

(II) The action to be taken which, it is asserted, is required by such order, rule, regulation, or direction, which action would not otherwise be taken, and which action if taken, it is claimed will result in damage to the motor carriers:

(III) The extent to which the motor carrier asserts such order, rule, regulation, or direc-

tion, will result in damage to it if complied with:

(IV) The nature of the damage which the motor carrier asserts it will suffer as a result of compliance with such order, rule, regulation, or direction and an estimate of the amount of such asserted threatened damage.

(B) Each such protest shall be made to the Federal Manager by registered mail or telegram within five (5) days after the issuance of the particular order, rule, regulation or direction, so protested.

11. Upon the protest by a motor carrier of any order, rule, regulation, or direction as provided in section 9 hereof, the effectiveness of the order, rule, regulation, or direction shall be suspended as to the protesting motor carrier pending further consideration and direction by the Federal Manager, and such motor carrier shall not take any action to carry into effect such order, rule, regulation, or direction until further directed so to do by the Federal Manager. The Federal Manager may thereafter direct that the protested order, rule, regulation, or direction shall be forthwith placed into effect with such modification thereof, if any, as to the protesting carrier or others as he may deem necessary or desirable.

12. Unless otherwise specifically directed, all communications concerning possession, control and operation, under this order shall be addressed to the Federal Manager, Metro-

politan Life Building, Third Street and Second Avenue, Minneapolis, Minnesota.

13. A copy of this Operations Order No. 1 shall be posted by each carrier in the principal place of business or headquarters of its transportation system and in each terminal maintained in connection with its operations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 484

THE UNITED STATES,
Petitioner,

VS.

R-B FREIGHT LINES, INC., a Corporation,
Respondent.

ACQUIESCENCE IN PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES MOTOR CARRIER CLAIMS COMMISSION

R-B Freight Lines, Inc., Respondent in the instant proceeding, acquiesces in the petition of the United States, filed December 19, 1951, for a writ of certiorari to review the final determination of the Motor Carrier Claims Commission in the above entitled case. Respondent differs from the United States on the possible existence of error in the opinion below; but there is no disagreement as to the Jurisdiction of this Court or the timeliness of the petition. Respondent's further reasons for its acquiescence are set out later herein.

OPINION BELOW

The opinion of the Motor Carrier Claims Commission is included in that portion of the printed record[1] which has been submitted by petitioner in support of its petition for a writ.

JURISDICTION

Respondent agrees with and adopts as its own the conclusions of petitioner set out on pages 2, 3 and 4 of the petition for a writ with respect to jurisdiction of this Court and with respect to the timeliness of the petition.

QUESTIONS PRESENTED

The questions said by petitioner to be presented by this proceeding will be determined by this Court if a writ is granted. Respondent is not in disagreement with petitioner's phrasing of the questions proper; and it is agreed that the questions indicate with sufficient accuracy the general scope of the proposed review. However, some language in petitioner's preface to its statement of the questions is believed to be misleading, either because of insufficiency or because of inaccuracy. We believe a proper understanding of this case requires correction of these inaccuracies at the outset.

As petitioner states, a strike of over-the-road drivers in the summer of 1944 was the event preceding Government seizure of the strike-bound and idle properties of respondent and 102 other midwest motor common carriers of freight. The Government taking was consumated under the terms of an Executive Order of the President, which not only authorized, but also directed the Director of the Office of Defense Transportation to take action with respect to the motionless systems and properties. But the

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[1] By stipulation of the parties, subject to the Court's approval, petitioner has printed only the formal record for the purposes of its petition for a writ.

Order does not refer to a "resumption of operations." Rather, it provides the most comprehensive empowerment, authority or direction to the Director of the Office of Defense Transportation to operate the systems and properties "by or for the United States," to operate "as the Director may deem necessary," "to utilize the transportation systems, to the exclusion . . . of all other traffic thereon, for the transportation of troops, war material and equipment," and to take such further action as might be required to carry out the principal directives of the Order.

On the date of seizure the idle R-B properties were put in operation over the protests of the owner, who was unwilling and in fact financially unable[2] to itself resume common carrier operations. Maintenance of operation thereafter was under the over-riding managerial supervision of a Federal Manager. The former manager of the company was retained in a post of immediate local managerial authority over details of operation, "subject, nevertheless, to further rules, regulations, orders and directives of the Federal Manager,"[3] which arrangement "provided a continuing ability to interpose further measures of Federal control."[3] The scope of authority and the vigorous exercise of managerial functions on a general level applicable to all carriers and a sequence of most pronounced managerial acts of the Federal Manager, with specific impact on the R-B property (See e.g. those acts described

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[2] This point is mentioned later herein (note 11, p. 9, infra). The Record before this Court on the petition for a writ does not fully reflect this fact, but is apparent from the record of the proceeding below.

[3] These quotations are taken from a quasi-public document entitled "Report of the Federal Manager of Motor Carrier Transportation Systems and Properties to the Director of the Office of Defense Transportation" (Exhibit P-69 of the record below; not reproduced in the instant Record). The report was submitted at the conclusion of the Federal Manager's duties and describes in detail the objectives and accomplishments of this office, including the most comprehensive range of activities involved in management of the seized properties.

in Finding No. 31 of the Motor Carrier Claims Commission. Record, 36), preclude any possibility that the reference by petitioner to "minimal interference" during the period August 11, 1944, to December 31, 1944 is accurate.

Federal management of respondent's properties was continued from August 11, 1944, to December 31, 1944, under the arrangement above summarized. Effective January 1, 1945, the owner was replaced in his "post of immediate managerial authority" by a Federal employee, and certain other proceedings were taken to emphasize the dedication of the R-B property to Federal uses. Petitioner concedes that operation of the R-B system and properties thereafter until release on November 1, 1945, was operation and use of a Federal instrumentality requiring the payment of Constitutional compensation. The arrangements on January 1, 1945, which occasioned this concession, are characterized by the Motor Carrier Claims Commission (Record, 40) as "simply one of the most significant of a series of acts by the Federal Manager, all . . . of which plainly indicated that he was in full control for the Government."

STATEMENT

The statement contained on pages 6 to 23 of the United States' petition for a writ is accurate insofar as the same repeats or correctly paraphrases findings of the Motor Carrier Claims Commission and, to this extent the statement is adopted for purposes of this acquiescence as respondent's own statement. However, it is again pointed out that the authorizations and directions contained in Executive Order No. 9462 were of the most comprehensive nature, and the principal authorization for the Government "to operate or arrange for the operation of the properties" was fully exercised.

In a sense it is true, as petitioner states, that R-B's general manager regulated details of operation of the motor

carrier system during the period of Federal use in much the same way as he had done prior to the take over. But this was pursuant to instruction from above, and all phases of operation thus conducted were always subject to the continuing supervision and complete domination of the Federal Manager. We suggest that Mr. Buergi's supervision of operating details under general Federal management, was exercised "in much the same way" as his supervision of operating details had been exercised under domination and general management of the Board of Directors and President of R-B prior to the Federal seizure. While it may be accurate to say that R-B's former manager operated the system, this can be accepted only in the limited sense that a terminal manager of R-B might be said to have "operated" the terminal, or a driver to have "operated" his truck.

REPLY TO CERTAIN ARGUMENTS CONTAINED IN PETITIONER'S REASONS FOR GRANTING THE WRIT

Respondent acquiesces in the petition of the United States to grant a writ of certiorari in the instant proceeding. But we most vigorously disagree with the arguments with respect to error below which the United States makes in the brief-like section of the petition which is entitled "Reasons for Granting the Writ." In this section, petitioner attacks the case on its merits, asserts propositions of law which we do not believe are accurate and flatly states conclusions (particularly with respect to the nature of the legal relationship between the United States and respondents) which are inconsistent with or do not follow from facts with which Petitioner purports to agree.[4] We do not believe this Court is adequately or accurately advised by petitioner's "Reasons" of the matter

[4] "The Government does not question the Commission's findings of evidentiary facts as far as they go. . . .", petition for the writ, n. 4, p. 7.

which will actually come before it for review if the petition for a writ is granted.

At the outset, we believe we recognize in the petition for a writ a recurrence of persistent efforts made by the Government in the trial below to confuse the facts in the instant case with the facts in somewhat analagous proceedings previously before the United States Court of Claims and this Court, in *Wheelock Bros., Inc., v. United States,*[5] and *Pewee Coal Company v. United States.*[6] The Court of Claims, most unfortunately, dealt with Pewee Coal Company and Wheelock Bros., Inc., as "companion cases," and both the majority and minority opinions of the Court of Claims in Wheelock appear to have been largely and improperly influenced by factors in the Pewee case which were not present in Wheelock.

It is true that Wheelock was one of the midwest motor carriers subjected to the seizure proceedings of August 11, 1944. It is true that the orders and some of the other circumstances of seizure of both R-B and Wheelock were similar to the orders and circumstances of taking of the coal mines. But there are most significant differences between the taking and operation of the coal mines on the one hand and the motor carriers on the other. We have elsewhere[7] speculated that the failure of the United States Court of Claims to remark upon these distinctions was attributable to an inadequate development of a record by Wheelock before the Court of Claims, to plausible but

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[5] Wheelock Bros., Inc. v. United States, 115 Ct. Clms. 733, 88 Fed. Supp. 278, reversed and dismissed on jurisdictional grounds in 341 U. S. 319.

[6] Pewee Coal Co. v. United States, 115 Ct. Clms. 626, 88 Fed. Supp. 426; 341 U. S. 114.

[7] We discussed this subject at length in a Brief of **Amicus Curiae** Robert G. May filed with this Court on behalf of R-B Freight Lines in the cited Wheelock proceeding, pursuant to agreement of the United States dated October 26, 1950. At the time of filing the Wheelock case was before this Court on cross petition for certiorari, Nos. 169 and 177, October term, 1950.

factually unwarranted advance assumptions by the Court of Claims as to the nature of the cases, and to the vigor of Government attorneys in taking full advantage of an opportunity to try and argue a strong case in part upon the record of a weaker case.

We do not mean to suggest by the foregoing that the decision of this Court in the Pewee Coal Co. case is anything less than a nearly conclusive authority for the proposition that the Government's relationship in 1944-1945 with the group of motor carriers of which R-B is a member, requires Fifth Amendment compensation It is our point that the circumstances of the seizure and use of the motor carriers, in comparison with the coal mine seizures presents an indisputable, *a fortiori* compensable taking. The factors which moved the majority to decision in Pewee are the equivalent of factors present in the motor carrier cases. But the factors which induced the Chief Justice, Mr. Justice Clark, Mr. Justice Burton and Mr. Justice Minton to dissent in Pewee, and Mr. Justice Reed to prepare a separate concurring opinion,[8] are not factors in the situations of the motor carriers.

A few examples will point up our meaning in the foregoing paragraph. In common the motor carrier and coal mine seizures involved almost identical seizure orders; former owners in each case were retained as local managers subject to overriding managerial authority of the Government. Attempts were made in both situations to minimize liability by self-serving declarations "of little persuasive effect"[9] by the Government as to the nature of

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[8] Mr. Justice Reed refers to a type of situation exemplified by "the operation of railroads, motor carriers or coal mines." We respectfully suggest that this indiscriminate lumping of motor carriers with coal mines is unwarranted on the facts. At the time of argument of the Wheelock case, in the foggy atmosphere of "companion cases" which were not companions, the misconception of Mr. Justice Reed was a natural one.

[9] United States v. United Mine Workers, 330 U. S. 258.

certain relationships. But, in the motor carrier seizures the act of taking was consumated over the protests and against the desires of the owners while the seizure of the coal mines was accomplished with the permission, and even at the persuasion, of the owners. The activities of the Government during the operation of the coal mines were of a most negative nature, whereas the activities of the Government during the operation of the motor carrier properties were positive, active and vigorous.[10] Government operation of the coal mines put in motion idle properties adaptable only for the single use of mining coal and completely valueless when at a standstill; but putting the seized R-B properties in motion revived a common carrier operation which the owner had necessarily abandoned, and deprived him of the opportunity to put his truck, tractors and trailers at work for military, industrial and commercial uses in a highly remunerative market of "sharp demand." (Finding No. 38; Record, 30.)

The distinctions noted are not merely theoretical or technical. In contradistinction to many phases of the coal mine takings, the seizure and use of the motor carrier properties, as any inspection of the findings of the Motor

[10] Note Findings Nos. 25, 27, 29 and particularly 31 of the Motor Carrier Claims Commission (Record 21, 25 and 26). Also interesting in this connection is the Report of the Federal Manager of Motor Carrier Transportation Systems and Properties to the Office of Defense Transportation (Exhibit P-69; not reproduced in the Record), referred to supra, n. 2, p. 3. This Report indicates that the Federal Manager at the outset set up regional and subregional offices in the ten state area of operations of the properties which had been seized. The Federal Manager's own office in the field comprised an Auditing Section; an Operating Section; a Traffic and Rates Section; an Administrative Section; and various subdivisions of some of these. The Federal Manager in his field activities alone, incurred nearly a quarter of a million dollars in administrative expenses. "As many as 16 accountants of the Interstate Commerce Commission were engaged in work . . . at one time or another" . . . for the Federal Manager. "The Interstate Commerce Commission, Dr. W. H. Stevens, Director of the Bureau of Transport Economics and Statistics; Dr. Ford K. Edwards, Head Cost Analyst of the Cost Section of the Bureau; Mr. Robert A. Nixon, Director of the Office of Price Administration; Mr. Harry Wilson . . ." and others, appear to have assisted the Federal Manager in some capacity.

Carrier Claims Commission will clearly indicate, were proceedings of substance and not of form. These were no technical or token flag-raising ceremonies engaged in at the persuasion of the owners, themselves, to induce striking employees to come back to work at a wage the owners were willing to pay. This was no remote control taking accomplished by the issuance of a few orders and press releases from Washington. This, in the case of the motor carriers, was an all-out Government domination and use of the properties in conflict with owners' desires. This was a situation in which the owner was no longer willing nor financially able[11] to operate in a common carrier service. Respondent's business as a common carrier in fact, would not have been conducted at all, but for the Government.[12]

We believe the indicia of seizure and use of the motor carriers' property and the criteria of just compensation for such use are clear and definite in R-B; and not in the least obscured by those doubtful elements which caused a division of this Court in Pewee. When the instant case is viewed in the perspective of what actually took place, and not what might have taken place, or what took place in Pewee, or what the United States Court of Claims, on the basis of an inadequate record, thought took place in Wheelock, most of the problems alleged by petitioner to exist here disappear.

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[11] This is the testimony of R-B's manager (Tr. 105, not reproduced in the Record here). It is consistent with a statement of a member of the National War Labor Board that should increased labor cost be imposed on the carriers "it might be 20 or 30 or 40 percent of the industry that might be put out of business," (Ex. P-31; testimony of L. Hosking, Tr. 263; not reproduced in the Record here). The financial inability of R-B to resume operations without financial assistance of the Government to provide working capital is also noted by Government witness Ferris (Tr. 1471-1476; 1545, not reproduced in the Record here).

[12] Cf. Mr. Justice Reed (U. S. v. Pewee Coal Co., 314 U. S. 114, 121) quoted by petitioner as follows: ". . . The Government's supervision of a losing business . . . ought not to place upon the Government the burden of losses . . . unless the losses were incurred by the Governmental acts, e.g., if the business would not have been conducted at all but for the Government. . . ."

Petitioner supposes the existence here of some "going concern" problem of the type involved in Pewee. But there was in the instant case, a taking of use of what petitioner calls a "conglomeration of physical properties." These properties, having a market rental value for other uses, were nevertheless assembled or reassembled by the Government into a business which the owner once operated but was not longer willing or able to operate. Petitioner has claimed only the market rental value of physical properties and there has been no claime made and no compensation allowed for rental value of good will, franchises or other intangibles. Under these circumstances we gravely doubt the existence here of any of the "difficult problems inherent in fixing the value of use of a going concern." We consider the Government's suggestion in this respect to be merely another consequence of confusing a coal mine seizure with the case at bar.

There is another Government argument on the allowability of the petition for a writ which is based upon a supposition that there is something inherently extravagant, exhorbitant or unjust in the amount of the award. Probably we should dismiss the argument of petitioner in this respect by pointing out that Congress and not the Court has a remedy for extortionate awards when and if such actually exist. See e.g., *Prince Lines, Itd. v. U. S.*, 283 Fed. 535, writ of error, dismissed 263 U. S. 727. But we cannot refrain from observing that even were the rule otherwise the determination of the Motor Carrier Claims Commission bears no evidence of actual extravagance, even by petitioner's own somewhat dubious standards.

The rental value of the Yellow bus of which petitioner complains, for instance, was established at $22.00 per day, because this was the precise rental rate at which the Federal Manager acquired the use of an equivalent bus from

a third party during his physical occupation of the R-B property; and the rate was agreed upon after considered arms length negotiations between the parties. As for the aggregate return being 90 per cent of the appraised value of the R-B property, it is common knowledge that many actual annual rentals of movable physical property and many rentals fixed by the Office of Price Administration (cf. *United States v. Commodities Trading Corporation*, 339 U. S. 121) then exceeded (and still exceed) 100% of the value of the property. In the instant record there is evidence of common practice in the 1944-1945 period of charging rental for many items of office equipment at established OPA ceiling, fixed to return the owner 120% of the cost of the property annually. Many OPA orders in effect in 1946 and before not only provided ceilings but apparently governed actual payments by the Government to equipment owners for the rental of tractor-trailer combinations of the type owned by R-B which ceilings substantially exceeded the monthly fair rental value of equipment as computed from determinations in the instant case made by the Motor Carrier Claims Commission. See e.g., Maximum Price Regulation 571, Rev. Order 3, dated May 6, 1946, 11 Fed. Reg. 4890. One order of the Office of Price Administration (OPA Region VIII, Order G-13 under MPR 165, dated May 24, 1944, 9 Fed. Reg. 4871), provided rental ceilings for tractor equipment in all respects similar to the R-B equipment, in amounts (depending upon the undepreciated cost of the equipment) ranging from 84 per cent to 120 per cent per year of the cost of the equipment new, such ceilings being applicable to rentals to defense plants or for use on construction projects in a six-state western coast area.

In another connection petitioner seems to be suggesting that the determination of the Commission is excessive because there is no deduction of "all of the costs necessarily

incurred as an incident to operating the business" (p. 32 of the petition). We are not sure we understand this but we take it the calculations of the Commission are being challenged with respect to the relationship between credits and charges for the various ingredients of the total recovery. On this, we do not believe it necessary to explain the details of the actual accounting adjustments made by the Commission; but we are confident that the ultimate results are consistent with the rules approved by this Court in *Pewee Coal Co. v. United States,* 341 U. S. 114 and *Kimball Laundry Company v. United States,* 338 U. S. 1. For example we note that the offset of diminution of current assets against the sum of accretions to the property plus the diminution of liability gives the same result which would be reached if a net change in surplus were adjusted by adding back the depreciation on property for which compensation like rent is allowed. Since change in surplus is generally the measure of net profit or loss, it follows the Commission has in effect charged the Government with rent for physical property, has credited the Government with gross revenue from operation of the rented property and has charged the Government with all expenses of producing the revenue except for normal depreciation which was included in the rent. This is the equivalent of rent plus "conceptually different" (*Pewee Coal Co. v. U. S.,* 341 U. S. 114) operating loss (in this case minus operating profit).

We do not feel required, in view of the great and unanimous volume of authority on the subject, to comment at any length on war induced "boom" prices. The Commission below had complete briefing on the subject and its conclusion, with the advantage of voluminous testimony before it, was that no occasion exists in this case for departure from the usual rules on this subject. We are

convinced there is nothing in this point which requires review here.

Finally, petitioner engages in a deduction that because R-B did not rent its equipment prior to August 11, 1944, "the ordinary man in the trade" would not have rented his equipment after this day. There is no proof that the market for equipment either had or had not changed on the indicated date. But the inference engaged in by petitioner, even if pertinent, is not allowable. It will be noted that R-B, on and after August 4, 1944, was confronted with the realtistic problem of saddling a common carrier operation with a new wage scale and a new basis of wage making which the "ordinary business men" in the R-B organization had concluded would mean the end of the business. A new problem was faced on August 4, 1944, and a selection among alternative uses of the R-B properties under prior different conditions is not a logical premise for the presumption in which petitioner engages.

In review of the entire argument for petitioner on the merits we have concluded that if the facts of the motor carrier cases (instead of the assumed facts of coal mine, railroad or other cases) are considered, there is no contention of petitioner with respect to the impropriety of the Motor Carriers Claims Commission's determination which has not been considered and denied by this and other Courts. *United States v. Pewee Coal Co.,* 341 U. S. 114; *United States v. United Mine Workers,* 338 U. S. 258; *Pumpelly v. Green Bay Co.,* 13 Wall. 166, 20 L. Ed. 557; *United States v. Lynah,* 188 U. S. 445; *United States v. Causley,* 328 U. S. 256; *United States v. Buxton Lines, Inc.,* (CCA 4, 1948) 165 F. (2) 993; *United States v. Kimball Laundry Co.,* 338 U. S. 1; *Duckett & Co. v. United States,* 266 U. S. 149; *Phelps v. United States,* 274 U. S. 341; *Marion and Rye Valley R. R. Co. v. United States,* 270

U. S. 280, some language of which is construed in *U. S. v. General Motors Corp.*, 323 U. S. 373, 378; *Northern Pacific R. R. Co. v. North Dakota*, 250 U. S. 135; *United States v. Miller*, 317 U. S. 369; *Boom Co. v. Patterson*, supra, 98 U. S. 403; *Olson v. United States*, 292 U. S. 246; *United States v. Petty Motor Co.*, 327 U. S. 372; *Anderson v. Chesapeake Ferry Co.* (Va., 1947), 43 S. E. (2d) 10; *United States v. Westinghouse Electric and Manufacturing Co.*, 339 U. S. 261; *Boston Chamber of Commerce v. City of Boston*, 217 U. S. 189; *Prince Lines, Ltd. v. United States*, supra, (E. D. N. Y., 1922), 283 Fed. 535, writ dismissed 263 U. S. 727. The remarks of Senator Kellogg concerning the railroad taking of 1916, 56 Cong. Rec. 66th Congress, First Session, p. 2018 part 2; of Senator Robinson, *ibid.*, Part 3, p. 2202; and of Senator Cummins, *ibid.*, Part 3, p. 2189, are consistent with the cases. The recent case of *United States v. Cors*, 337 U. S. 325, cited by petitioner involves a statutory situation which does not suggest any occasion in the instant case for departure from principles long established in the cited cases.

We believe in the cases cited are all of the rules required for the determination of the questions said by petitioner to be presented by this proceeding. We believe the United States Motor Carrier Claims Commission has painstakingly considered every such rule and has applied the same properly to the situation before it in the proceedings below. As a consequence, our acquiescence to petitioner's application for a writ is based to no extent upon any concession or agreement that error exists in the Claims Commission determination. Our reasons, instead are as follow.

RESPONDENT'S REASONS FOR GRANTING THE WRIT

We agree without qualification with petitioner's analysis of the importance of this case with respect to other proceedings before the Motor Carrier Claims Commission. It was understood at the outset that the ultimate holding in R-B would govern the disposition of the other cases. The claim of R-B was selected for trial among the motor carrier cases as most nearly inclusive of the issues which would be met in all of the cases,[13] and attention to detail was given in trial to an extent which will not be feasible in the other cases. As pointed out by petitioner, the holding of the Commission in R-B will govern disposition of 102 other claims pending and will result in awards "aggregating tens of millions of dollars."[14] While we do not agree with petitioner that there is presented any question here which has not been resolved correctly by the Commission below, we do agree that the amounts involved and other considerations should induce this Court to review if the matter is at all within the principles which govern the granting of writs.

Primarily we urge this Court to grant a writ that it may undo the confusion initiated by the United States

[13] On this point, note the comments of counsel for respondent in the instant case set out in a brief, **amicus curiae**, filed on behalf of R-B with this Court in the case of Wheelock Bros., Inc. v. United States, 341 U. S. 319, to which reference has been made previously herein, n. 6, p. 6: "Because of the conflict of views of the United States and the motor carriers on most important issues in the R-B Motor Freight Lines case an appeal to this Court from the decision of the Motor Carrier Claims Commission appears certain regardless of what such decision may be, and this case has been prepared and presented in full detail with that probability in mind."

[14] Our own computation is that the principles of the R-B case extended to the cases of 103 carriers who are claimants before the Motor Carrier Claims Commission would theoretically result in awards aggregating approximately $22,400,000. This amount will be reduced as a consequence of certain stipulations, entered into to save trial time in other cases, and for other reasons. The claimants, of course, include practically all of the important motor carriers of ten states. During the year 1944 more than four million tons of freight were carried more than one hundred and fifty million vehicle miles by the properties of these carriers. (Ex. 69, Federal Manager's Report, not reproduced in the Record.)

Court of Claims in deciding the case of *Wheelock Bros., Inc. v. United States*, 88 Fed. Supp. 278, in part upon the record in the unjustifiably designated "companion case" of *United States v. Pewee Coal Co.*, 88 Fed. Supp. 284. Entirely unwarranted assumptions as to the identical nature and consequences of coal mine and motor carrier seizures prevail in many quarters as the result of the most unfortunate procedure adopted by the Court of Claims on these cases and we believe the minority and separate concurring opinions of this Court in Pewee if not reviewed by the authors with respect to the situation of the motor carriers in contradistinction to the situation of the coal mines reflect and will encourage a spreading of error of the type made below in Wheelock. We believe an opinion of this Court on the instant case is necessary to eliminate continuing litigation on principles which we believe have been settled by this Court. Additionally, we believe it should be of advantage to the operation of Government in war times, that this Court more specifically delineate the responsibility of the United States consequential upon its taking use of the particular type of property by the particular methods involved in the instant case.

Except for the points noted, we cannot suggest grounds for review of the R-B determination. But in the interests of final disposition of these long pending claims and the interest of the formal and authoritative settlement of legal problems which should not be confusing, but which apparently are, we respectfully join petitioner in its request that this Court re-examine the determination of the Motor Carrier Claims Commission in the case below and settle finally and authoritatively the principles upon which the claims of all of the motor carriers can be promptly decided.

CONCLUSION

For the reasons noted, respondent acquiesces in the prayer of petitioner here that the writ of certiorari be issued.

Respectfully submitted,

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